

# User Guide: Standard Not for Profit Funded Services Agreement

## 1. Overview

The *Standard Not for Profit Funded Services Agreement* Template is suitable for use for all low to medium risk, non-complex government procurements of services from the not for profit (NFP) sector, where up-front block funding is provided to NFP organisations.

Where payment is based on a fee for service and is paid in arrears, the *Standard Goods and Services Agreement Template* can be used, as appropriate.

This User Guide provides instructions for using the template and a clause by clause description of the legal impact of each contract term of the *Standard Not for Profit Funded Services Agreement* Template.

This User Guide is not a substitute for legal advice. Public authorities need to refer specific legal issues to the Crown Solicitor's Office.

## 2. Contract Structure

The *Standard Not for Profit Funded Services Agreement* Template has the following parts:

- Execution Page
- Attachment 1 - Agreement Details
- Attachment 2 - Standard Terms & Conditions
- Attachment 3 - Special Conditions
- Attachment 4 - Funded Services
- Attachment 5 – Block Funding & Payment Details
- Attachment 6 – Acquittal Form

Supplementing these documents are two clause banks:

- NFP Funded Services Special Conditions Clause Bank
- Execution Block Bank

## 3. Completing a Contract

### Execution Page

This part of the *Standard Not for Profit Funded Services Agreement* Template specifies the parties to the contract and where the parties execute the contract to make it legally binding.

Execution blocks for the government party and the NFP organisation are listed in the **Execution Block Bank**. The appropriate execution blocks for the government party and the NFP organisation need to be inserted in the space provided on the Execution Page.

| Government Party  | NFP organisation   |
|---|--|
| There are two forms of execution specified in the Execution Block Bank: <ul style="list-style-type: none"><li>• execution by affixation of the common seal by the Minister (if the Government Party is a department) or the statutory authority</li></ul> | There are three forms of execution specified the Execution Block Bank: <ul style="list-style-type: none"><li>• a Corporations Act company limited by guarantee</li><li>• an incorporated association</li><li>• a trustee</li></ul> |

| Government Party   | NFP organisation  |
|--|---|
| <ul style="list-style-type: none"> <li>execution by signature of an authorised officer on behalf of the Minister or statutory authority</li> </ul> <p>If a different form of execution is required this can be inserted.</p> | <p>If a different form of execution is required this can be inserted.</p> |

### Attachment 1 - Agreement Details

The variable content of the contract is to be inserted into this Attachment. Insert “not applicable” against items if they are not required for the specific procurement.

| Item No. | Item Title                        | Guidance Notes   |
|----------|-----------------------------------|--|
| 1.       | Government Party                  | Insert the name, ABN and contact details of the government party. For departments and statutory authorities that are not established as body corporates, insert the responsible Minister. For statutory authorities that are established as body corporates, insert the name of the statutory authority. |
| 2.       | Not for Profit Organisation (NFP) | Insert the name and contact details of the NFP organisation.   |
| 3.       | Commencement Date                 | Insert the date that the contract takes effect. This can be the date of last party execution or a specified date.  |
| 4.       | Expiry Date                       | Insert the date that the contract will come to an end. This can be a specified period or can be linked to the occurrence of a particular event e.g. the provision of a final report or acquittal.  |
| 5.       | Extension Period(s)               | If extension periods have been approved, the contract can be extended at the election of the government party. If not insert “not applicable”.   |
| 6.       | NFP’s ABN                         | An ABN is required otherwise the government party may be required to withhold tax at the rate prescribed in the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth). Also confirm whether the NFP is registered for GST.   |
| 7.       | Contract Managers                 | Each party must nominate a Contract Manager. Insert a telephone number and email address.  |
| 8.       | Named Persons                     | This is most relevant where particular person(s)’ expertise is required or where due to security or safety reasons, only named personnel can be engaged to provide the Funded Services.  |
| 9.       | Purpose                           | Include a brief functional description of the Funded Services being funded under the contract here. If there is a detailed specification this should be attached in Attachment 4.  |
| 10.      | Reports and Meetings              | Insert description of reports and delivery dates as well as any specific meetings that must be attended.   |
| 11.      | Block Funding and Payment Details | If the Block Funding and payment information is simple, this detail can be included in this item otherwise insert more detail into Attachment 5. If you do not need to use Attachment 5 please insert “not used” in that attachment.   |
| 12.      | Tax Invoice Issuing Party         | If the NFP organisation and the government party have agreed that the government party will issue a Recipient Created Tax Invoice (RCTI) then the government party is the Tax Invoice Issuing Party. In all other cases the Tax Invoice Issuing Party will be the NFP organisation.                      |

| Item No. | Item Title   | Guidance Notes  |
|----------|--|---|
| 13.      | Block Funding Reconciliation Date  | If the date on which the NFP organisation must reconcile its costs of providing the Funded Services against the Block Funding amount is not the anniversary of the Commencement Date, then please insert alternative date here.   |
| 14.      | Additional NFP Financial Information   | If the NFP organisation is not required by law to prepare audited financial statements, the government party can specify here that the optional financial information specified in clause 12.3 is required.   |
| 15.      | Service Credit /Abatement  | Service Credit/Abatement are a form of agreed liquidated damages for non-performance or for a failure to perform to the required level or standard. The amount of the Service Credit/Abatement must be a reasonable pre-estimate of the loss to the government party of the benefit of the NFP organisation's performance.  |
| 16.      | Quality Standards  | If there are particular industry or sector standards that apply to the delivery of the Funded Services, they should be inserted here.   |
| 17.      | Insurances<br>Public Liability Insurance<br><br>Professional Indemnity Insurance | The only mandated insurance is public liability insurance. All NFP organisations must have a minimum of \$1 million public liability insurance coverage.<br><br>Professional Indemnity (PI) insurance is optional and will depend on the nature of the Funded Services. PI insurance is issued on a "claims-made basis", meaning that the policy only covers claims made during the policy period. Therefore to cover liability incurred during the policy period but claimed after the expiry of that policy period, the PI Policy must cover claims made up to 3 years after expiry of the insurance cover (run off cover). |
| 18.      | Liability Limit  | The NFP Sector Funded Services Agreement is a procurement contract. On 25 July 2016 the South Australian Cabinet approved a policy that for low to medium risk low complexity (standard) government procurement contracts, a supplier's liability will be capped at a multiple of between 1 and 5 of the total contract value with the multiple to be based on a risk assessment conducted by the government party. The global cap applies to all heads of liability and all types of damage or loss.<br><br>For high risk contracts the Crown Solicitor's Office can assist by drafting bespoke liability provisions.        |
| 19.      | Additional Transition Requirements   | If there are additional requirements to those specified in clause 24 (Transition) then they can be inserted here (e.g. requirement for NFP organisation to have a written transition plan).   |
| 20.      | Approved Subcontractors  | If the NFP organisation has indicated as part of their offer to provide Funded Services that it will be using subcontractors, then the names and contact details of those subcontractors can be included in this item.  |
| 21.      | Additional Personnel Checks  | The government party may require police checks of NFP organisation personnel. If due to the nature of the funding (e.g. delivery of Funded Services where children or other vulnerable persons are present) it is necessary for further suitability checks of the NFP's personnel, these can be included in this item.  |
| 22.      | Notice Period for Termination for Convenience                                    | The government party can specify whether the government party requires a right to terminate for convenience. The period should not be less than 30 days unless the contract itself is for a very short period.  |

| Item No. | Item Title                            | Guidance Notes  |
|----------|---------------------------------------|---|
| 23.      | Form of Block Funding Acknowledgement | The government party can stipulate if acknowledgement of support from the South Australian Government is required and what type of acknowledgement; for example government branding on all paper documents related to the service that is being undertaken. |

## Attachment 2 - Standard Terms & Conditions

These terms and conditions have been negotiated with the NFP sector and represents a simplified, fair and consistent approach to funding the NFP sector. The standard terms & conditions can only be modified with the Department of Treasury and Finance's (DTF) approval.

If additional clauses are required (and have been approved by DTF) these are to be included in **Attachment 3 - Special Conditions**.

| Clause No. | Clause Title              | Guidance Notes   |
|------------|---------------------------|--|
| 1.         | Contract Length           | This is the period during which the contract will generally have legal force and effect. If as part of the acquisition approval process, extensions of the contract have been approved, then clause 1.2 will give effect to the extension(s).  |
| 2.         | Contract Managers         | These are the persons who are responsible for the day to day management of the relationship between the parties.   |
| 3.         | Purpose                   | The Block Funding must only be used for the agreed purpose to achieve the agreed outcomes.   |
| 4.         | Supply of Funded Services | This clause sets out the basis on which the NFP organisation is to supply the Funded Services.   |
| 5.         | Service Variation         | This clause enables either party to request a variation to the Funded Services.<br><br>The government party may request a variation by issuing a written request to the NFP organisation which then responds by providing a quote and other information about the impact of the variation on the Funded Services.<br><br>The NFP organisation may request a variation by issuing a Quote. In both cases the parties must negotiate in good faith to agree on the varied terms. |
| 6.         | NFP's Warranties          | This clause contains all of the contractual warranties that apply to the provision of the Funded Services. There may be other warranties that apply as a matter of law.  |
| 7.         | NFP's Personnel           | This clause sets out the requirements for police and other checks of the NFP's Personnel.<br><br>The government party has an absolute right to require the withdrawal of NFP Personnel from providing Funded Services.<br><br>This clause also deals with security requirements in relation to the government party's computer systems and premises.   |
| 8.         | Funding and Invoicing     | If the period of the contract is greater than 12 months, the Block Funding payable from the first anniversary of the Commencement Date will be indexed against the applicable NFP Sector Indexation Rate during the period of the contract.  |
| 9.         | GST                       | The default position is that a NFP organisation has both an  |

| Clause No. | Clause Title                              | Guidance Notes  |
|------------|---|---|
|            |   | Australian Business Number (ABN) and is registered for GST. If the NFP organisation is not registered for GST, then no GST may be charged for supplies. If an NFP organisation does not have an ABN, then tax at 46.5% must be withheld and paid to the ATO.  |
| 10.        | Repayment of Unallocated or Misused Funds | As Block Funding is paid in advance and there is no "price" for the services, any unexpended funds must be repaid to the government party when specified in the contract, unless the NFP organisation has requested the right to retain or carryover unexpended amounts.  |
| 11.        | Provision of Information                  | As Block Funding is paid in advance in sizeable lump sums, it is necessary that the government party is able to confirm that the Block Funding is being used for the Purpose to achieve the Outcomes. Confirmation can occur through the NFP organisation providing reports.<br><br>If the government party requires additional reports, it can request that the NFP provides a quote of the NFP's reasonable costs in providing the additional reports.  |
| 12.        | Financial Reporting and Auditing          | The NFP organisation is required to provide a written acquittal of its expenditure of the Block Funding at the times specified in the Agreement using the form in Attachment 6.<br><br>Where an NFP organisation is required by law to prepare audited Financial Statements, then it can provide a copy of these to satisfy the reporting requirements in this clause.<br><br>Where an NFP organisation is not required by law to prepare audited Financial Statements, the government party has the option of requiring the NFP organisation to provide its balance sheet, income and expenditure statement and statement of changes in equity for the financial year.<br><br>The government party may require the financial accounts of the NFP organisation to be audited and if the Block Funding has not been used for the Purpose the NFP organisation must pay the costs of the audit. |
| 13.        | Inspection                                | To ensure that the Block Funding is being used for the agreed Purpose the government party has the right to inspect premises, records and interview NFP Personnel.  |
| 14.        | Intellectual Property Rights              | Ownership of intellectual property in existence before the contract is entered into is unchanged.<br><br>The default position for intellectual property created during the contract, is that the NFP organisation will own the intellectual property and grant a broad licence to enable the government party to use any reports, manuals or other deliverables required to be supplied under the contract.   |
| 15.        | Confidential Information                  | Each party has obligations in relation to the use and disclosure of information that the other party has designated as "Confidential Information".  |
| 16.        | Privacy                                   | The clause recognises that the NFP organisation is a "contracted service provider" and so is required to comply with South Australian Government Information Privacy Principles ( <a href="https://www.dpc.sa.gov.au/documents/rendition/DPC-Circular-Information-Privacy-Principles-IPPS-Instruction.pdf">https://www.dpc.sa.gov.au/documents/rendition/DPC-Circular-Information-Privacy-Principles-IPPS-Instruction.pdf</a> ) in relation to the collection, storage, disclosure or other use of personal information under the contract.   |

| Clause No. | Clause Title                    | Guidance Notes   |
|------------|---------------------------------|--|
| 17.        | Publicity                       | The NFP organisation must acknowledge the government party's financial support in any advertising, publicity or promotional material.<br><br>The NFP organisation and the government party must cooperate in terms of the content and timing of any public announcements or media releases about the contract.   |
| 18.        | Insurance                       | The default position under the Standard Terms & Conditions is that the NFP organisation is in the best position to assess its liability and to manage its risks under the contract whether by insurance or otherwise. The only mandated insurance is public liability insurance which has been set at the lowest amount available from insurers.   |
| 19.        | Liability Limit                 | The 25 July 2016 South Australian Cabinet decision replaces the previous <i>Guidelines for the Limitation of Liability of Suppliers, Consultants and Contractors</i> which have been revoked.  |
| 20.        | Set-Off                         | This clause enables the government party to subtract money owed to it by the NFP organisation from any amount due and owing to the NFP organisation.   |
| 21.        | Dispute Resolution              | This clause requires the parties to at least attempt to resolve any disputes between them before either party has recourse to the courts. This is subject to a party seeking interlocutory relief in the case of genuine urgency.  |
| 22.        | Ending this Agreement           | This clause sets out the contractual grounds under which each party may terminate the contract. The Standard Terms & Conditions do not exclude any common law or statutory rights to terminate.<br><br>There is a right for the government party to terminate for convenience. This right should only be exercised where there is a genuine need to terminate the contract due to a change in Government policy. |
| 23.        | Effect of Ending this Agreement | This clause operates to preserve each party's rights even though the contract has been brought to an end.<br><br>This clause also specifies those clauses that survive termination of the contract. For example the obligation to not disclose Confidential Information.   |
| 24.        | Transition                      | The NFP organisation must assist the government party to ensure continuity of service during transition-in if the NFP organisation is providing the Funded Services for the first time and on transition-out if the Funded Services are to be handed over to another service provider (or the government party). The NFP must comply with transition arrangements identified in Attachment 1 Item 19.            |
| 25.        | Subcontracting                  | This clause limits the right of the NFP organisation to subcontract its obligations under the contract.  |
| 26.        | Work Health & Safety            | Under this clause if the NFP organisation is required to work at the government party's premises, the NFP organisation is required to comply with the government party's work health and safety policies and to report any hazards to the government party.  |
| 27.        | Conflict of Interest            | The NFP organisation must disclose any potential or actual conflict between the private interests of the NFP organisation or any of its Personnel and the NFP and its Personnel's obligations to the government party under this Agreement.  |
| 28.        | Contract Disclosure             | The terms of the Agreement are not confidential information and may be provided to the public on request.  |



| Clause No. | Clause Title                   | Guidance Notes  |
|------------|--------------------------------|---|
| 29.        | Compliance with Laws           | The NFP organisation must comply with all laws that apply to the performance of the NFP organisation's obligations under the contract.  |
| 30.        | Governing Law and Jurisdiction | The law of the contract is South Australian law and the courts of South Australia including the Federal Court, have the exclusive right to adjudicate on any issue arising under the contract.  |
| 31.        | Entire Agreement               | This clause excludes all prior agreements between the parties from having contractual force and effect and affirms that the terms and conditions of the contract are the only terms that govern the bargain between the parties.  |
| 32.        | No Assignment                  | The NFP organisation must obtain the government party's written approval if it wishes to assign any rights or obligations under the contract.<br><br>The clause also provides that if there is a Machinery of Government Change, the entity that replaces the government party will be bound as if it was the government party. |
| 33.        | Modification                   | For a variation to the contract to be effective the variation must be agreed in writing by both parties.  |
| 34.        | Severance                      | If a court determines that a part of the contract is void for any reason, then the parties agree that invalidity of that part does not affect the validity of the rest of the contract.   |
| 35.        | Counterparts                   | This clause gives the parties the option of executing the contract by each party signing a copy of the contract and then providing that signed copy to the other party.   |
| 36.        | No Further Obligation          | The government party's obligations in terms of funding the NFP organisation are limited to the express terms of the contract and the government party is not responsible if the cost of providing the Funded Services exceeds the Block Funding.  |
| 37.        | Feedback and Complaints        | The NFP organisation must enable recipients of the Funded Services and other stakeholders to provide feedback on its performance and delivery of the Funded Services.   |
| 38.        | Interpretation                 | This clause sets out the basic rules for interpreting the terms and conditions of the contract.   |
| 39.        | Definitions                    | Includes all defined terms (in capitals) used in the contract.  |
| 40.        | Special Conditions             | The effect of this clause is to bring within the scope of the contract any special conditions that are inserted into Attachment 3.  |

### Attachment 3 - Special Conditions

The **NFP Funded Services Special Conditions Clause Bank** includes some DTF approved additional terms that can be inserted, if needed, in Attachment 3 (Special Conditions).

If there are agency specific terms or other terms that the parties wish to include then approval is required from Accounting Services Branch in the Department of Treasury and Finance. The Crown Solicitor's Office can assist with drafting additional terms.

If additional terms are not required, insert "not used" in Attachment 3.

| Clause No. | Special Condition Title                 | Guidance Notes  |
|------------|---|---|
| 1.         | Non-Exclusivity                         | The government party is able to purchase Funded Services from another supplier or NFP organisation.   |
| 2.         | Cooperating with Investigations         | If the NFP organisation is providing Funded Services to children or young people then this clause requires the NFP organisation to cooperate with any investigation authorised by the child protection legislation.   |
| 3.         | Industry Participation Policy           | If the value of the procurement is greater than \$4M (GST Inc.) (greater than \$1M (GST Inc.) in regional SA) but less than \$50M (GST Inc.) then the NFP organisation must prepare a Standard Industry Participation Plan (SIPP) and report against that SIPP during the period of the contract. |
| 4.         | Industry Participation Policy           | If the value of the procurement is greater than \$50M (GST Inc.) then the NFP organisation must prepare a Tailored Industry Participation Plan (TIPP) and report against that TIPP during the period of the contract.   |
| 5.         | Suitability of Persons                  | This clause is mandated for Department for Education and Department of Child Protection (DCP) procurements; it is optional for other government parties. NOTE: This clause has been updated due to changes in child protection legislation.   |
| 6.         | Suitability of Persons (Other Offences) | This clause is mandated for Department for Education and DCP procurements; it is optional for other government parties. NOTE: This clause has been updated due to changes in child protection legislation.  |
| 7.         | Information Sharing                     | This clause applies if the sharing of information may assist in preventing harm or threats to the safety and wellbeing of vulnerable people (including children) and where such sharing is permitted by PC012 Information Privacy Principles (IPPS) Instructions.                                 |

#### Attachment 4 – Funded Services

The detailed Specification for the Funded Services is to be inserted into this Attachment. If there is no detailed Specification then insert “not used” in Attachment 4.

#### Attachment 5 – Block Funding and Payment Details

If there is detailed funding information for the procurement then this can be attached to or included in Attachment 5. If there is no detailed funding information, insert “not used” in Attachment 5.

#### Attachment 6 – Acquittal Form

The Government Party can attach its preferred acquittal form in Attachment 6.



#### 4. Contract Completion Checklist

##### Step 1 Complete Variable Content for Contract

- ☐ Insert the relevant details in Attachment 1
- ☐ Insert "not applicable" for those items that are not relevant to the procurement
- ☐ Delete all drafting prompts (identified by coloured highlighting)
- ☐ Insert any applicable Special Conditions in Attachment 3
- ☐ If required, include details of Funded Services Attachment 4
- ☐ If required, include detailed Funding and Payment information in Attachment 5
- ☐ Attach Acquittal Form in Attachment 6

##### Step 2 Execution of Contract

- ☐ Ensure that the NFP organisation is a legal entity (e.g. a body corporate)
- ☐ Insert execution blocks from the Execution Clause Bank on Execution Page
- ☐ To accept the contract either:
  - each party must have a fully executed copy of the contract, or
  - each party must ensure that the other party has a copy of the contract which contains the first party's execution (known as counter party execution).